(3)

No. 00-189

Supreme Court, U.S.
FILED
NOV 3 2000
CLERK

IN THE

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA
AND COEUR d'ALENE TRIBE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT COEUR D'ALENE TRIBE

RAYMOND C. GIVENS *
BRIAN J. CLEARY
GIVENS, FUNKE & WORK
424 Sherman Avenue, Suite 308
Post Office Box 969
Coeur d'Alene, Idaho 83814
(208) 667-5486

JOSEPH D. KEARNEY
Post Office Box 1709
Milwaukee, Wisconsin 53201

* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
REASONS FOR DENYING THE PETITION	1
I. THE COURT OF APPEALS CORRECTLY DECIDED THE CASE UNDER THIS COURT'S CONTROLLING PRECEDENTS OF *MONTANA*, *UTAH*, AND *ALASKA*	1
A. The Court Of Appeals Properly Determined That Congress Intended To Defeat State Title To The Submerged Lands By Recognizing And Acknowledging The Coeur d'Alene Reservation Which It Knew Included Submerged Lands.	1
B. The Idaho Admission Bill Is An Additional Recognition And Acknowledgment Of The Coeur d'Alene Reservation By Congress At The Point Of Statehood And After It Knew The Reservation Included The Submerged Lands	7
C. Post-Statehood Events Demonstrate That Congress Intended That State Title To The Submerged Lands Be Defeated And Tribal Ownership Continue After Statehood.	9
D. Congress's Intent To Defeat Future State Title Cannot Be Disproved By Its Deferral Of Approval Of Agreements With The Coeur d'Alene Tribe Until After Statehood	11
II. THERE IS NO CONFLICT WITH DECISIONS OF THE IDAHO SUPREME COURT OR AMONG THE CIRCUITS	14

TABLE OF CONTENTS—Continued

Page

III. OTHER ARGUMENTS OF PETITIONER AND ITS AMICI COUNTIES DO NOT WARRANT REVIEW 16

CONCLUSION 21

APPENDIX

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 9, 11, 16
Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) 7
Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 17
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 16
Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, *cert. denied*, 459 U.S. 977 (1982) 19
Donovan-Hopka-Ninneman Co. v. Hope Lumber Mfg. Co., 194 F. 643 (9th Cir. 1912) 17
Guidry v. Sheet Metal Workers Nat. Pension Fund, 493 U.S. 365 (1990) 20
Holden v. Joy, 17 Wall. 211 (1872) 6
Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) 17
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 16
Montana v. United States, 450 U.S. 544 (1981) 1, 16
Moore v. United States, 157 F.2d 760 (1946), *cert. denied*, 330 U.S. 827 (1947) 19
Muckleshoot Indian Tribe v. Trans-Canada Enterprises, 713 F.2d 455 (9th Cir. 1983), *cert. denied*, 466 U.S. 1049 (1984) 19
Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) 19
Skokomish Indian Tribe v. France, 320 F.2d 205 (9th Cir. 1963). *cert. denied*, 376 U.S. 943 (1964) 19
South Dakota v. Bourland, 508 U.S. 679 (1993) ... 16

TABLE OF AUTHORITIES—Continued

Page

United States v. Alaska, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970) 19
United States v. Alaska, 521 U.S. 1 (1997) ..... *passim*
United States v. Aranson, 696 F.2d 654 (9th Cir. 1983), *cert. denied*, 464 U.S. 982 (1983) 19
United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) 16, 20
United States v. Holt State Bank, 270 U.S. 49 (1926) 6, 16
United States v. Ladley, 4 F. Supp. 580 (D. Idaho 1933) 17
United States v. Texas, 143 U.S. 621 (1892) 18
Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) 1, 2, 16, 20

STATE CASES

Bowman v. McGoldrick Lumber Co., 219 P.1063 (Idaho 1923) 14
Callahan v. Price, 26 Idaho 745, 146 P. 732 (1915) 18
Erickson v. State, 970 P.2d 1 (Idaho 1998) 14
Johnson v. Johnson, 14 Idaho 561, 95 P. 499 (1908) 17
Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085 (Idaho 1983) 14, 15
Lattig v. Scott, 17 Idaho 506, 107 P. 47 (1910), *rev'd on other grounds*, 227 U.S. 229 (1913) ... 17
West v. Smith, 511 P. 2d 1326 (Idaho 1973) 15

TABLE OF AUTHORITIES—Continued

FEDERAL CONSTITUTION AND STATUTES — Page

U.S. Const. art. 2, § cl. 2 12
Act of Apr. 10, 1869, 16 Stat. 13 12
Act of Apr. 23, 1872, 17 Stat. 55 12
Act of June 1, 1872, 17 Stat. 214 12
Act of Apr. 29, 1874, 18 Stat. 36 12
Act of June 22, 1874, 18 Stat. 146 12
Act of Dec. 15, 1874, 18 Stat. 291 12
Act of Aug. 15, 1876, 19 Stat. 176 12
Act of Feb. 28, 1877, 19 Stat. 254 12
Act of Mar. 3, 1885, 23 Stat. 362 12
Act of May 15, 1886, 24 Stat. 29 13
Act of May 15, 1886, 24 Stat. 44 13
Act of Feb. 8, 1887, 24 Stat. 388 13
Act of May 1, 1888, 25 Stat. 113 13
Act of May 30, 1888, 25 Stat. 160 5
Act of Mar. 1, 1889, 25 Stat. 757 12
Act of March 2, 1889, 25 Stat. 980 5
Act of July 3, 1890, 26 Stat. 215 ch. 656 ..... 9, 11
Act of Aug. 19, 1890, 26 Stat. 336 13
Act of Sept. 25, 1890, 26 Stat. 468 13
Act of Mar. 3, 1891, 26 Stat. 989 ..... 8, 10, 13
Act of Jul. 3, 1892, 27 Stat. 120 13
Act of Aug. 15, 1894, 28 Stat. 286 13
Act of Aug. 15, 1894, 28 Stat. 306 13
Act of Mar. 2, 1895, 28 Stat. 876 13
Act of Mar. 2, 1895, 28 Stat. 894 13
Act of June 10, 1896, 29 Stat. 321 13
Act of Feb. 23, 1897, 30 Stat. 62 13
Act of June 6, 1900, 31 Stat. 672 13
Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 347 ..... 3, 8

TABLE OF AUTHORITIES—Continued

STATE CONSTITUTION	Page
Idaho Const., art. XXI, § 19	8, 11
MISCELLANEOUS	
In re the Application for License of the Washington Water Power Company, Project No. 2545, Federal Power Commission (F.E.R.C.)	18
S. Res. Mis. Doc. No. 36, 50th Cong. (1888)	4
S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 3 (1888)	4
S. Ex. Doc. No. 14, 51st Cong., 1st Sess. (1889)	9
Cohen, *Handbook of Federal Indian Law* 107 (1983 ed.)	12

Respondent Coeur d'Alene Tribe ("Tribe") submits this brief in opposition to the State of Idaho's petition for a writ of certiorari. Under Rules 15.3 and 24.2, the Tribe is not required to set forth threshold matters and thus can proceed directly to demonstrating why the petition should be denied.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS CORRECTLY DECIDED THE CASE UNDER THIS COURT'S CONTROLLING PRECEDENTS OF *MONTANA*, *UTAH*, AND *ALASKA*.

The primary basis for Idaho's petition is its insistence, stated several different ways, that the court of appeals' decision conflicts with decisions of this Court. *See* Pet. 16-26. This assertion is incorrect. As set forth in this section, the decision below squarely applies this Court's precedents to the particular facts of this case.

A. The Court Of Appeals Properly Determined That Congress Intended To Defeat State Title To The Submerged Lands By Recognizing And Acknowledging The Coeur d'Alene Reservation Which It Knew Included Submerged Lands.

The court of appeals correctly decided this case under this Court's controlling precedents of *Montana v. United States*, 450 U.S. 544 (1981), *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987), and *United States v. Alaska*, 521 U.S. 1 (1997). The court of appeals recognized that under this "trilogy of decisions, [which] provides the framework for analyzing whether a state's presumptive title to submerged lands within its borders has been defeated," there is a "two-prong test" (first set forth in *Utah*). Pet. App. 11-12. Specifically, the court stated, "the question before us is 'whether the United States intended to include submerged

lands within the [reservation] and to defeat [Idaho's] title to those lands.'" Pet. App. 12 (quoting *Alaska*, 521 U.S. at 36).

The court of appeals was required to address only one aspect of this test. Idaho did not dispute the first prong, which asks whether the federal government intended to include the submerged lands at issue within the Tribe's reservation. In the words of the court of appeals, "[f]or purposes of this appeal, the State concedes that the 1873 executive order was intended to reserve title to the submerged lands for the benefit of the Tribe." Pet. App. 4 n. 3; *see also* Pet. App. 10, 11, 13, 15 n. 9, 16, 17 (similarly noting and relying on Idaho's concession of this point). The court of appeals therefore "focus[ed] on the second prong–whether Congress demonstrated an intent to defeat the State's title to the submerged lands." Pet. App. 13.

The court of appeals carefully followed the guidelines of *Alaska* in answering this question in the affirmative. *Alaska* held that this second prong of the *Utah* test–intent to defeat a future state's title–was satisfied when Congress knew that "the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands" in the reservation, and Congress "explicitly recognize[d]" the reservation after it knew the reservation included the submerged lands. *Alaska*, 521 U.S. at 44, 45. As the court of appeals indicated, the following is the critical portion of this most recent precedent from this Court:

> "[T]here would have been no barrier to Congress retaining a petroleum reserve, including submerged lands, at the point of Alaska's statehood, provided it satisfied *Utah['s]* . . . requirements of demonstrating a clear intent to include submerged lands within the Reserve's scope and a clear intent to defeat Alaska's title. *It follows that Congress could achieve the same result by explicitly recognizing, at the point of Alaska's*

> *statehood, an executive reservation that clearly included submerged lands.*"

Pet. App. 13 (quoting *Alaska*, 521 U.S. at 44) (emphasis added). It is this language in *Alaska* that supplied the court of appeals with the standard it applied to the facts of this case. *See* Pet. App. 13-23. Contrary to petitioner's suggestions, it is on the basis of this specific guidance from this Court that the court of appeals was required to assess whether Congress met the requirement of "act[ing] affirmatively to defeat state title to submerged lands." Pet. 19-22 (quoted material at 20).[1]

Both the court of appeals and district court carefully applied *Alaska*'s approach in concluding that Congress had intended to defeat the future state's title. *See* Pet. App. 19-25 (court of appeals), 68-82 (district court). The court of appeals first noted that this second prong of intent to defeat title had been satisfied in *Alaska* where Congress had fashioned its actions in the Alaska Statehood Act around its recognition that "a petroleum reserve [had been] created by executive order 35 years prior to Alaska's statehood." Pet. App. 14 (citing *Alaska*, 521 U.S. at 32-46). This type of congressional action was sufficient, according to this Court, to preserve federal title to the reserve and to defeat the future state's

---

[1] This aspect of *Alaska* also is a complete response to petitioner's separate argument that the court of appeals erred when it "expressly declined to examine the purpose of the reservation as understood by Congress." Pet. 22-26 (quoted material at 22). Congress's intent to defeat a future state's title can be established, as *Alaska* demonstrates, by its ratification of the Executive's previous reservation of submerged lands. *See Alaska*, 521 U.S. at 43-45, 52-57. Further, inclusion of the submerged lands in the Reservation was necessary to accomplishing the United States' purposes here because it was part of the consideration demanded by the Tribe in exchange for acceding to the United States' other goals. Pet. App. 15, 17, 61, 65, 74-76. Finally, both the court of appeals, Pet. App. 18 n.11, and the district court, Pet. App. 81 n.25, correctly analyzed why such congressional re-examination of the "purpose of the reservation," Pet. 22, is not necessary.

claim. The court of appeals here then explained that, "[i]n this case, several similar factors counsel the same result." Pet. App. 15. In particular, the court pointed to "the series of congressional actions taken in the late 1880s[,] ascertaining that the Executive construed the [1873 Coeur d'Alene] reservation to include submerged lands and authorizing negotiations to recover whatever portion of the lands the Tribe was willing to sell." *Id.* This series of actions "shows that Congress acknowledged that beneficial ownership of the lands had already passed to the Tribe." Pet. App. 15-16. As the court of appeals succinctly stated in rejecting one of Idaho's contentions on this point, "what matters [under the foregoing block quotation from *Alaska*] . . . is Congress' awareness that the 1873 Reservation included submerged lands, an issue about which there can be no doubt given the response to the 1888 resolution."[2] Pet. App. 19.

---

[2] This 1888 resolution was described by the court of appeals as follows: "[T]he Senate . . . pass[ed] a resolution in 1888 inquiring of the Secretary of the Interior about the boundaries of the Tribe's reservation and 'whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers.' S. Res. Mis. Doc. No. 36, 50th Cong. (1888). The Senate also sought advice about 'whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.' *Id.* Two weeks later, the Secretary replied, stating that the 1873 reservation included the submerged lands at issue and attaching a report by the Commissioner [of Indian Affairs]; this report informed Congress that '*the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene*, except a very small fragment cut off by the north boundary of the reservation' and that portions of the Coeur d'Alene and St. Joseph Rivers flowed through the reservation. Letter from the Secretary of the Interior, S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 3 (1888). The Commissioner opined that '*changes could be made in the boundaries for the release of some or all of the navigable waters*' and that it would be 'an easy matter' to negotiate a cession of the reservation, 'including all or a portion of the navigable waters,' once the 1887 agreement had been ratified. *Id.* at 2." Pet. App. 6-7 (emphasis added).

The court of appeals went on to determine that Congress recognized and acknowledged the Coeur d'Alene Reservation in two pre-statehood statutes passed *after* Congress knew that the Reservation included the submerged lands at issue here. The first such pre-statehood statute was the 1888 railroad right-of-way statute. Act of May 30, 1888, 25 Stat. 160. This was a grant of a right-of-way through the Reservation, conditioned on Tribal approval and payment to the Tribe by the railroad. *See id.*; Pet. App. 21 n.13. The second such pre-statehood statute was the 1889 statutory authorization to enter into negotiations for a possible cession by the Tribe to the United States of additional portions of their Reservation. Act of March 2, 1889, 25 Stat. 980, 1002. The court of appeals explained as follows:

> Although Congress had the opportunity and the power to repudiate the executive reservation and the 1887 agreement, it did not do so. Instead, in 1889 it took affirmative action, choosing to authorize negotiations–with few limitations aside from an instruction to acquire non-agricultural lands–"for the purchase *and release* by said tribe of such portions of *its reservation* . . . as such tribe *shall consent to sell*" (emphasis added). Act of March 2, 1889, 25 Stat. 980, 1002. The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation–boundaries that included submerged lands. This series of events indicates that Congress accepted the Secretary's advice to leave any cession up to negotiations. Indeed, the fact that Congress decided to make its authorization open-ended reinforces the district court's conclusion that Congress recognized and accepted the Tribe's beneficial ownership of all lands–including submerged lands–within the 1873 reservation; it also shows Congress's recognition of the uncertainty of

> regaining any land at all, and its particular desire to recover whatever submerged lands it could.

Pet. App. 21-23 (emphasis in original, footnote omitted). What is particularly striking about the 1889 negotiation authorization statute is that it was not merely a general congressional recognition of the Reservation.[3] Rather, as the court of appeals noted, "[t]he events surrounding the [1889 negotiation] authorization [statute] clearly show that the main purpose of the new negotiations was to regain from the Tribe whatever *submerged lands* it was willing to sell." Pet. App. 22 n.14 (emphasis added).

In short, the court of appeals properly determined that Congress recognized and acknowledged the Coeur d'Alene Reservation after it knew the Reservation included the submerged lands. On the basis of this analysis, the court concluded that Congress "'otherwise [than by a definite declaration] made very plain' its intention regarding the submerged lands" in a manner sufficient under this Court's precedents to defeat a future state's title. Pet. App. 23 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)) (internal citation omitted); *see also* Pet. App. 12 (quoting full phrase from *Holt State Bank*). In this regard, it is important to recall that "[n]othing in *Alaska* requires that congressional action take the form of explicit congressional ratification of an agreement reserving or conveying title to particular submerged lands." Pet. App. 12. It rather is enough that "[w]ith the 1887 agreement and the response to the 1888 resolution before it, Congress, fully aware of the boundaries of the 1873 reservation and the extent of the submerged lands that were within it, sought to modify the boundaries described in the agreement–and it sought to do so

---

[3] The railroad right-of-way act in this case was a general congressional recognition, just as the appropriation statutes were general recognitions of the Cherokee Reservation in *Holden v. Joy*, 17 Wall. 211 (1872), cited with approval in *Alaska*, 521 U.S. at 45.

via purchase rather than the simpler expedient of rejecting the executive reservation." Pet. App. 23. These congressional "actions show recognition and acceptance of the passage of beneficial ownership to the Tribe, for [Congress] sought to *regain* as much submerged land as possible." *Id.* Indeed, all this is more than enough: As the court of appeals noted, "there is significantly more evidence of congressional intent with regard to the submerged lands in this case than with regard to the wildlife refuge in *Alaska*," where this Court also held that Congress intended to defeat a future state's title. Pet. App. 20 n. 12.

B. The Idaho Admission Bill Is An Additional Recognition And Acknowledgment Of The Coeur d'Alene Reservation By Congress At The Point Of Statehood And After It Knew The Reservation Included The Submerged Lands.

The court of appeals ended its inquiry after it determined that Congress had intended to defeat state title to the submerged lands because Congress had recognized and acknowledged the Reservation in the 1888 and 1889 statutes. The court found that it was not necessary to "rel[y] on the disclaimer clause in the Idaho Constitution" as a third congressional recognition and acknowledgment. Pet. App. 23.[4] The court noted that "t[o] the extent the clause is considered at all, however, it weighs in favor of the conclusion we have reached, for it disclaims title to land 'held by' Indians." Pet. App. 24.

---

[4] The court of appeals also found it unnecessary to address the Tribe's ownership of the submerged lands under several other theories. *See* Pet. App. 13. In the event that this Court reversed the court of appeals, it presumably would remand so that that court could address these arguments in the first instance. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 n.5 (1998).

The provisions of the Idaho Constitution, ratified by Congress in the Idaho Admission Bill, are similar to those in the Alaska Statehood Act in that both provide for federal ownership and jurisdiction over certain lands. To take the instant case first, the petitioner, in its Constitution, disclaimed ownership of "all right and title . . . to all lands . . . held by any Indians or Indian tribes." Idaho Const., art. XXI, § 19, *quoted in* Pet. App. 23 n.15. This document also provided that "until the title thereto shall have been extinguished by the United States, [all lands held by any Indians or Indian tribes] shall be subject to disposition by the United States," and that "said *Indian lands* shall remain under the absolute jurisdiction and control of the Congress of the United States." Idaho Const., art. XXI & § 19 (emphasis added). This specific disclaimer of "Indian land" is particularly important because Article 5 of the 1887 Agreement with the Tribe (as well as the later ratification statute, Act of Mar. 3, 1891, 26 Stat. 989, 1086, Pet. App. 89) specifically denominated the Reservation "Indian lands." In these circumstances, Idaho specifically disclaimed ownership and jurisdiction over the Reservation, which everyone knew included the submerged lands. These state constitutional disclaimers were then "accepted, ratified and confirmed" by Congress in the Idaho Admission Bill. Act of July 3, 1890, 26 Stat. 215 ch. 656. This is a clear expression of Congress's intent to defeat state title to the submerged lands–indeed, Congress's acceptance, ratification and confirmation of Idaho's disclaimer of ownership and acceptance of federal regulation are essentially the same as the provisions in the Alaska Statehood Act that were relied upon in *Alaska* as to both the oil reserve and the wildlife refuge at issue there.[5] To the extent there is a difference, it is

---

[5] In Alaska the recognition of federal ownership and regulatory control over the reservations was contained in the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 347.

Another similarity to the wildlife refuge in *Alaska* is that prior to statehood Congress was provided with a map that clearly showed the

that, in a sense, this case is even stronger than *Alaska* because here it is the petitioner itself that did the disclaiming, and Congress "accepted, ratified and confirmed" that disclaimer. 26 Stat. 215 ch. 656. This is also an entire response to petitioner's argument that "[a]n affirmative intent to defeat state title to submerged lands within federal reservations requires that Congress make plain its intent that federal ownership would continue *after* statehood." Pet. 20. As set forth above, Congress *did* make plain this intent.

In short, Congress's ratification of the Idaho Constitution in the Idaho Admission Bill constitutes a third recognition and acknowledgment of federal/tribal ownership and federal control that could properly have been relied upon by the court of appeals as an additional means of determining that Congress had intended to defeat state title.

C. Post-Statehood Events Demonstrate That Congress Intended That State Title To The Submerged Lands Be Defeated And Tribal Ownership Continue After Statehood.

The Court of Appeals noted that several post-statehood events also "reflect [Congress's] recognition and confirmation that submerged lands had passed to the Tribe prior to Idaho's statehood." Pet. App. 25-27 (quoted material at 25); *see also* Pet. App. 25 n.17 (citing *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89-90 (1918), to refute Idaho's argument that consideration of post-statehood events is forbidden in judicial effort to determine Congress's pre-statehood intent). Specifically, the court of appeals reviewed the post-statehood cession of the so-called Harrison Strip in 1894. This cession included a "portion of the lake," which

---

submerged lands in the reservation. *See Alaska*, 521 U.S. at 56. In this case the map provided to Congress showed the reservation boundary specifically crossing the lake. S. Ex. Doc. No. 14, 51st Cong., 1st Sess. (1889); *see infra* Appendix to this Opposition.

"would not have been necessary absent a contemporary understanding that the Tribe had beneficial ownership of the bed." Pet. App. 26. This Harrison Cession thus is a "post-statehood acknowledgment of tribal ownership of the lake bed" and a "memorialization of prior events." *Id.*

Congress's pre-statehood intent to defeat state title to the submerged lands is reflected in another post-statehood event as well. In the same statute that ratified the 1887 and 1889 Agreements with the Tribe, Congress directed that a patent to certain submerged lands be given to one Frederick Post. Act of March 3, 1891, 26 Stat 989, 1027 (Pet. App. 87, 97). Specifically, chapter 22 of the statute approving the 1887 and 1889 Coeur d'Alene Agreements directed that "the Secretary of the Interior shall cause to be surveyed for and patented to Frederick Post . . . . *such portion of said [Coeur d'Alene] reservation* as is recited in the agreement in word and figures as follows. . . . includ[ing] *all three of the river channels* and islands, with enough land on the north and south shores for water power and improvements." *Id.* (Pet. App. 97-98) (emphasis added). This is further indication that Congress intended that tribal ownership of the submerged lands continue *after* statehood and state title to the submerged lands be defeated. If the submerged lands had passed to petitioner at statehood in 1890, Congress could not have directed in the 1891 statute that the "three river channels" be conveyed to Frederick Post. *Id.*

In short, these post-statehood events demonstrate that Congress intended that state title to the submerged lands be defeated and tribal ownership continue after statehood.[6]

---

[6] As the foregoing sections demonstrate, before a court could conclude that Congress did *not* intend to defeat a future state's title here (as petitioner urges), much more would have to be considered than the one statute identified by petitioner's Question Presented (*viz.*, the 1889 negotiation statute). *See* Pet i. That statute, as the court of appeals demonstrated, adequately discloses under this Court's precedents that

D. Congress's Intent To Defeat Future State Title Cannot Be Disproved By Its Deferral Of Approval Of Agreements With The Coeur d'Alene Tribe Until After Statehood.

Unable to demonstrate a conflict with this Court's controlling precedents, the petitioner ultimately makes a case-specific argument that "[t]he court of appeals' decision ignores the fact that Congress purposefully deferred its ratification of the Reservation until after statehood." Pet. 26-29 (quoted material at 26). The petitioner's only support for

---

Congress *did* intend to defeat a future state's title here and thus that title to the submerged lands in question never passed to Idaho. Before reaching the contrary conclusion, on the other hand, on the ultimate question of whether Idaho received title to the lands at the time of statehood, one would have to confront not only the 1889 statute, but other statutes that, in respondent's view, are also sufficient under this Court's precedents to affirm the judgment of the court of appeals. Specifically, Congress's pre-statehood enactment of the railroad right-of-way statute (*see supra* p. 5) and its statute, contemporaneous with statehood, that "accepted, ratified and confirmed" the Idaho Constitution's eternal ("forever") "disclaim[er] [of] all right and title . . . to all lands . . . owned or held by any Indians or Indian tribes" and that constitution's acknowledgment that "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States" (*see supra* p. 8 (quoting Act of July 3, 1890, 26 Stat. 215, and Idaho Const. Art. XXI, § 19)), are themselves sufficient under this Court's decision in *Alaska* to demonstrate Congress's intent to defeat a future state's title. *See supra* pp. 2-3 (block quotation of *Alaska*, 521 U.S. at 44). Further, Congress's after-statehood statute conveying to Frederick Post part of the reservation that had been yielded back to the government also reflects Congress's pre-statehood intent–a concept that the court of appeals, in discussing the post-statehood Harrison Cession, recognized was appropriate under this Court's decision in *Alaska Pacific Fisheries v. United States*, 248 U.S. at 89-90. *See supra* pp. 9-10. In these circumstances, petitioner not only has failed to demonstrate that the court of appeals' ruling conflicts with this Court's precedents (as Parts I.A through I.C of this opposition demonstrate that it does it not), but also has inadequately set forth the full range of considerations that would have to underlie any conclusion that the court of appeals' ruling should be outright reversed. *See also supra* p. 7 n. 4.

this proposition is Congress's requirement that the 1887 and 1889 Agreements with the Tribe would not be in effect until ratified by Congress. Contrary to petitioner's implication throughout this argument, the requirement of congressional ratification was nothing unique to the Coeur d'Alene Agreements.

It was standard practice for Congress to require that agreements with Indian tribes be returned to Congress for ratification. Senate ratification of any treaties with Indian tribes had always been required. *See* U.S. Const. art. 2, § 2, cl. 2. In 1871, because Congress discontinued the use of treaties with Indian tribes, it instead required that agreements be ratified by both the House and Senate. *See* Cohen, *Handbook of Federal Indian Law* 107 (1982 ed.). Thereafter, agreements negotiated with Indian tribes pursuant to congressional authorization routinely required congressional ratification. The 1886 congressional authorization, for example, was for negotiations with not only the Coeur d'Alene Tribe but also numerous other tribes in the Dakota, Montana, Idaho, and Washington territories. Act of May 15, 1886, 24 Stat. 44. Congressional approval was required of *all* the resulting agreements. *See id.* ("no agreement made shall take effect until ratified by Congress"). So too did Congress require congressional approval of other agreements that it authorized be negotiated.[7] The requirements of congressional

---

[7] Agreement with Ute Indians, Colorado, Sept. 13, 1873, Act of Apr. 23, 1872, 17 Stat. 55 (authorized), Act of Apr. 29, 1874, 18 Stat. 36 (ratified); Agreement with Eastern Band of Shoshone Indians, Sept. 26, 1872, Act of June 1, 1872, 17 Stat. 214 (authorized), Acts of June 22, 1874, Dec. 15, 1874, 18 Stat. 146 at 166, 18 Stat. 291 (ratified); Agreement with Sioux, N. Arapahoe and Cheyenne Indians, Sept. 26, 1876, Acts of Aug. 15, 1876, Apr. 10, 1869, 19 Stat. 176 at 197, 16 Stat. 13 at 40 (Sec. 4 & 5) (authorized), Act of Feb. 28, 1877, 19 Stat. 254 (ratified); Agreement with Muscogee (or Creek) Nation of Indians, Jan. 19, 1889, Act of Mar. 3, 1885, 23 Stat. 362 at 384 (authorized), Act of Mar. 1, 1889, 25 Stat. 757 (ratified); Agreement with Indians at Fort

ratification in the 1886 and 1889 negotiation authorization statutes had absolutely nothing to do specifically with the submerged lands. It was simply the normal practice of the day replacing the requirement of Senate treaty ratification.

In short, no aspect of this general requirement that all agreements with Indian tribes be returned to Congress for approval can be used to cast doubt on the court of appeals' conclusion that congressional intent to defeat future state title

---

Berthold Agency, Dec. 14, 1886, Act of May 15, 1886, 24 Stat. 29 at 44 (authorized), Act of Mar. 3, 1891, 26 Stat. 989 at 1032 (ratified); Agreement with Spokane Indians, Mar. 18, 1887, Act of May 15, 1886, 24 Stat. 29 at 44 (authorized), Act of Jul. 3, 1892, 27 Stat. 120 at 139 (ratified); Agreement with Gros Ventre, Piegon, Blood, Blackfeet and River Crow Indians, Montana, Dec. 28, 1886, Act of May 15, 1886, 24 Stat. 29 at 44 (authorized), Act of May 1, 1888, 25 Stat. 113 (ratified); Agreement with Nez Perce Indians, Idaho, May 1, 1893, Act of Feb. 8, 1887, 24 Stat. 388 at 389 (authorized), Act of Aug. 15, 1894, 28 Stat. 306 at 331 (ratified); Agreement with Cheyenne and Arapahoe Tribes of Indians, Oct. 1890, Act of Aug. 19, 1890, 26 Stat. 336 at 343 (authorized), Act of Mar. 3, 1891, 26 Stat. 989 at 1022 (ratified); Agreement with Crow Indians, Montana, Dec. 8, 1890, Act of Sept. 25, 1890, 26 Stat. 468 (authorized), Act of Mar. 3, 1891, 26 Stat. 989 at 1039 (ratified); Agreement with Yankton Sioux, Dec. 31, 1892, Act of Jul. 13, 1892, 27 Stat. 120 at 137 (authorized), Act of Aug. 15, 1894, 28 Stat. 306 at 314 (ratified); Agreement with Alsea & Other Indians on Siletz Reservation in Oregon, Oct. 31, 1892, Jul. 13, 1892, 27 Stat. 120 at 138 (authorized), Act of Aug. 15, 1894, 28 Stat. 306 at 326 (ratified); Agreement with Shoshone and Arapahoe Tribes of Indians, Wyoming, Apr. 21, 1896, Act of Aug. 15, 1894, 28 Stat. 286 at 306 (authorized), Act of Feb. 23, 1897, 30 Stat. 62 at 93 (ratified); Agreement with Indians of Fort Belknap Indian Reservation, Montana, Oct. 9, 1895, Act of Mar. 2, 1895, 28 Stat. 876 at 900 (authorized), Act of June 10, 1896, 29 Stat. 321 at 353 (ratified); Agreement with Indians of Blackfeet Indian Reservation, Montana, Sept. 26, 1895, Act of Mar. 2, 1895, 28 Stat. 876 at 900 (authorized), Act of Jun. 10, 1896, 29 Stat. 321 at 357 (ratified); Agreement with Indians of San Carlos Indian Reservation, Arizona, Feb. 25, 1896, Act of Mar. 2, 1895, 28 Stat. 894 (authorized), Act of Jun. 10, 1896, 29 Stat. 321 at 360 (ratified); Agreement with Shoshone and Bannock Indians of the Fort Hall Reservation, Idaho, Feb. 5, 1898, Jun. 10, 1896, 29 Stat. 341 (authorized), Jun. 6, 1900, 31 Stat. 672 (ratified).

to the submerged lands at issue here is disclosed by proper application of the specific test set forth in *Alaska* for determining such intent.

II. THERE IS NO CONFLICT WITH DECISIONS OF THE IDAHO SUPREME COURT OR AMONG THE CIRCUITS.

Petitioner asserts two additional bases for review of the court of appeals' decision. Neither has merit.

First, petitioner is simply incorrect in asserting that "[t]he court of appeals' decision presents irreconcilable conflicts with decisions of the Idaho Supreme Court." Pet. 14-16 (quoted material at 14). None of the four cases, decided over a span of 75 years, upon which petitioner relies to make out a conflict addresses ownership claims of the United States or the Tribe to Lake Coeur d'Alene.

Petitioner itself concedes that three of the cases "addressed situations arising outside the Coeur d'Alene reservation." Pet. 15. To take them in the order presented by petitioner, *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983), was a challenge by an environmental group on public trust doctrine grounds to petitioner's issuance of a marina permit on Lake Coeur d'Alene; *Erickson v. State*, 970 P.2d 1 (Idaho 1998), was an unsuccessful challenge to state ownership of submerged lands claimed to be upland prior to the water level's being raised by a hydroelectric dam built on the three river channels previously conveyed by Congress to Frederick Post (see *supra* p. 10 for a description of that conveyance); and *Bowman v. McGoldrick Lumber Co.*, 219 P. 1063 (Idaho 1923), was a dispute between a littoral property owner and a lumber company that was storing logs on Lake Coeur d'Alene abutting the property. No claim of federal or tribal lake ownership was involved in any of these cases.

The same is true of petitioner's fourth and final case, *West v. Smith*, 511 P. 2d 1326 (Idaho 1973), which was a dispute between the owner of a houseboat moored on Lake Coeur d'Alene and the littoral property owner regarding the right to moor the houseboat. While petitioner attempts to demonstrate that at least this case involves land also in dispute in the instant litigation (*see* Pet. 15-16 & n.8), petitioner cannot escape the fact that federal or tribal lake ownership was no more an issue in *West* than it was in the other three cases discussed above.

To the extent these cases say anything relevant to this case, it is only that they set forth unremarkable dicta to the effect that ordinarily "the 'State of Idaho holds title to the beds of all navigable bodies of water below the natural high water mark for the use and benefit of the public.'" Pet. 15 (quoting *Kootenai Environmental Alliance*, 671 P.2d at 1088). But no one in this litigation has ever doubted that proposition. This entire case has rather been about whether that ordinary rule does not apply because of the federal government's actions in the nineteenth century in ceding title to *particular* submerged lands to the Tribe before Idaho became a state.[8]

Second, petitioner also argues that this case should be reviewed even though there is no conflict between the circuits because "[o]utside the Ninth Circuit, state title to submerged lands within executive order reservations apparently has not been challenged." Pet. 17-18 (quoted material at 18). Petitioner suggests that the issue in this case is therefore "peculiar to States within the Ninth Circuit" and that these "unique circumstances [of] this case" accordingly support dispensing with the Court's ordinary principles governing grants of certiorari. Pet. 17.

---

[8] That these cases say nothing to recommend petitioner's claim of ownership to the submerged lands over the Tribe's claim is presumably why petitioner elected to cite none of these cases to the court of appeals.

This argument rests on a fallacy. The issue in this case is *Congress's* intent to defeat state title to the submerged lands. It has nothing to do with whether the reservation was initially created by *executive order* (as it was here), by agreement between the Tribe and the executive branch, or by some other means. It is thus no surprise that, contrary to petitioner's suggestion, cases addressing aspects of the issue presented in this case–Congress's intent–have come to this Court from state courts and several circuits. *Holt State Bank* came from the Minnesota Supreme Court, *South Dakota v. Bourland* from the Eighth Circuit, *Alaska Pacific Fisheries* and *Montana* from the Ninth Circuit, and *Choctaw*, *Utah*, and *Cherokee* from the Tenth Circuit.[9] There is thus no basis for crediting the petitioner's argument that "conflicts with other circuits may never appear." Pet. 18.

III. OTHER ARGUMENTS OF PETITIONER AND ITS AMICI COUNTIES DO NOT WARRANT REVIEW.

Petitioner and its amici, Benewah and Kootenai Counties, make several other arguments in support of the petition. None is sufficient to warrant this Court's review.

First, petitioner suggests that *Alaska* provides no guidance in this case because "original jurisdiction decisions are not intended to provide national guidance or establish rules of general applicability." Pet. 18. No citation is offered to support remarkable suggestion. Petitioner is simply wrong. Original jurisdiction cases have established numerous rules of general applicability. It was in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that this Court established the

---

[9] *See United States v. Holt State Bank*, 270 U.S. 49 (1926); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Montana v. United States*, 450 U.S. 544 (1981); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987); *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987).

fundamental principle of American jurisprudence that the courts of the United States can review and void statutes that are inconsistent with the United States Constitution. It was in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), that the Court established the fundamental principle that Indian tribes are "domestic dependent nations" in a trust relationship with the United States. *Id.* at 17. It is unnecessary to list any of the many other examples of original jurisdiction cases that, like *Alaska* here, establish rules of general application and are properly looked to for national guidance.

Second, petitioner and its amici argue as a general theme that the petition should be granted and the court of appeals' decision reversed because the case involves submerged lands which are tied to the State's history, sovereignty, and public-trust doctrine. *See* Pet. 2-3, 12, 14-16; Amicus Br. 3-5, 8-10. Of course, in making these arguments, petitioner and its amici take no account of this Court's more balanced observation that, "[a]s the Tribe views the case, the lands are just as necessary, perhaps even more so, to its own dignity and ancient right." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287 (1997). In any event, petitioner specifically argues that the court of appeals' decision "upsets a century of State ownership." Pet. 2. In reality, the petitioner did not even claim ownership of any submerged lands for the first 25 years of statehood. As the federal district court in the state summarized in another case 67 years ago, at the time of statehood submerged lands under both *navigable* and non-navigable waters were owned by riparian landowners, not the petitioner: "Under the law of Idaho at the time of statehood, and when the patents were issued to the allottees, the riparian owner upon a stream, both navigable and non-navigable, takes title to the bed of the stream . . . ." *United States v. Ladley,* 4 F. Supp. 580, 582 (D. Idaho 1933); *accord Johnson v. Johnson*, 14 Idaho 561, 95 P. 499 (1908); *Lattig v. Scott*, 17 Idaho 506, 107 P. 47 (1910), *reversed on other grounds*, 227 U.S. 229 (1913); *Donovan-Hopka-Ninneman Co. v. Hope*

Lumber Mfg. Co., 194 F. 643, 649 (9th Cir. 1912) (applying rule to submerged lands underlying navigable lakes); *but cf. Callahan v. Price*, 26 Idaho 745, 146 P. 732 (1915) (overruling prior cases holding riparian or littoral landowners held title to mid-stream or lake). Furthermore, Idaho did not begin regulating encroachments on lakes in Idaho until 1974, *one year after* the Tribe first sought a determination of tribal ownership of Lake Coeur d'Alene. *In re the Application for License of the Washington Water Power Company*, Project No. 2545, Federal Power Commission (F.E.R.C.) (granting the Tribe intervention Sept. 14, 1973). Contrary to petitioner's assertion, submerged land ownership and regulation have no special place in Idaho history. Far from upsetting "a century of State ownership" (Pet. 2), the court of appeals has only quieted title which has been disputed for years.

Amici go so far as to suggest that the petition should be granted because it is appropriate for the Supreme Court to decide this, and apparently every, submerged lands case, simply given the implications for state sovereignty.[10] Amicus Br. 4-5. Amici's suggestion is unpersuasive. The case upon which amici rely for the proposition that it "best comports 'with the dignity of a state, that a case in which it was a party should be determined in the highest, rather than a subordinate, judicial tribunal of the Nation,'" Amicus Br. 2, 4-5 (quoting *United States v. Texas*, 143 U.S. 621, 643 (1892)), does not in any sense purport to govern the Court's discretionary determination whether to grant or deny

[10] Petitioner essentially shares this view with amici, for the question presented by petitioner is so narrow and specific to this litigation that it is inconceivable that a ruling from this Court would create a precedent that lent itself to anything approaching wide application. *See* Pet. i (stating that the question presented is "whether a defeat of state title to submerged lands is implied when Congress, in a pre-statehood act, authorizes cession negotiations with an Indian tribe for the purpose of removing submerged lands from the executive order reservation they occupy").

certiorari in this case. In the quoted material, as the Court took pains to make clear, this Court was merely explaining, in an original jurisdiction case, why *Congress* had decided, "under [then] existing statutes," to provide "*exclusive* jurisdiction" to the Supreme Court "of a suit by the United States against a State." *Texas*, 143 U.S. at 643 (emphasis added). By revising these jurisdictional statutes since the late nineteenth century, and thereby permitting suits such as the instant one to go forward in federal district court and subject to ordinary rules concerning appellate review by federal courts of appeals and this Court, Congress has made clear that it has reconsidered whether mandatory scrutiny by this Court is necessary to preserve "the dignity of a state." The Court has viewed the matter similarly: it frequently has denied certiorari in other submerged lands cases, both where claims of ownership as against the state were rejected by lower courts *and* where such claims were upheld.[11]

Finally, amici also express concern that the Tribe is regulating non-Indian use of the lake and river, implying that non-Indian use might be prohibited. Of course the Tribe is regulating use of the lake. Concern would be proper only if

---

[11] *See, e.g., Moore v. United States*, 157 F.2d 760 (1946), *cert. denied*, 330 U.S. 827 (1947) (upholding tribal ownership of submerged lands); *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964) (rejecting tribal ownership of submerged lands); *United States v. Alaska*, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970) (upholding federal ownership of submerged lands); *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, *cert. denied*, 459 U.S. 977 (1982) (upholding tribal ownership of submerged lands); *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983), *cert. denied*, 464 U.S. 982 (1983) (rejecting tribal ownership of submerged lands but remanding to determine aboriginal title); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) (upholding tribal ownership of submerged lands); *Muckleshoot Indian Tribe v. Trans-Canada Enterprises*, 713 F.2d 455 (9th Cir. 1983), *cert. denied*, 466 U.S. 1049 (1984) (upholding tribal ownership of submerged lands).

the Tribe were *not* regulating such use. Even though this is an issue which was not raised below, it is appropriate to note that non-Indians *are* allowed to boat, fish, and maintain encroachments on these waters pursuant to reasonable regulations. Coeur d'Alene Tribe Code, ch. 20, 43, 44. More fundamentally, the doctrine of navigational servitude guarantees non-Indian use of waters in Indian reservations. This Court has already reached that conclusion:

> If the States themselves are subject to this servitude, we cannot conclude that [an Indian tribe]–though granted a degree of sovereignty over tribal lands–gained an exemption from the servitude simply because it received title to the riverbed interests. . . .
>
> . . . [T]he tribal interests at issue here simply do not include the right to be free from the navigational servitude.

United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 707-08 (1987). The Tribe is properly regulating the lake and allowing all to use it as required by navigational servitude.[12]

---

[12] Amici's other arguments in defiance of this Court's precedents also do not support review. First, as for the claim that there is no "public exigency" or "international duty" justifying the defeat of state title to submerged lands (Amicus Br. 7-8), this Court made clear in *Alaska* that the "public exigency" and "international duty" language of earlier cases was only "congressional policy, not a constitutional obligation." *Alaska*, 521 U.S. at 40 (citing *Utah*, 482 U.S. at 197). Second, amici suggest that at the time in question Congress had a general policy calling for an end of tribal ownership of land. *See* Amicus Br. 2-3, 5-7. Even leaving aside amici's incomplete and therefore incorrect characterization of Congress's general policy, there can be no suggestion that such a policy or even the General Allotment (Dawes) Act of February 8, 1887, 24 Stat. 388, to which amici point as evidence of this policy, can control over the specific (including statutory) evidence of congressional intent that the court of appeals here explained was controlling under the *Utah-Alaska* test. *Cf. Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990) ("specific statute will not be controlled or nullified by a general

In short, none of these additional arguments of petitioner or its amici forms a basis for granting review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND C. GIVENS *
BRIAN J. CLEARY
GIVENS, FUNKE & WORK
424 Sherman Avenue, Suite 308
Post Office Box 969
Coeur d'Alene, Idaho 83814
(208) 667-5486

JOSEPH D. KEARNEY
Post Office Box 1709
Milwaukee, Wisconsin 53201

* *Counsel of Record*

---

one"). Finally, as for amici's argument based on the public trust doctrine, it is sufficient to note that amici do not claim that the doctrine has ever operated in this context to provide any guidance to whether Congress intended to defeat a future state's title. In other words, amici can make their public trust doctrine argument only by their ignoring the controlling test of *Utah* and *Alaska*. *See* Amicus Br. 8-10 (Part III.D).